Supreme Court, U.S.
FILED

No. 93- 931466 MAR 17 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

T-H NEW ORLEANS LIMITED PARTNERSHIP,
Petitioner,

v.

FINANCIAL SECURITY ASSURANCE INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

RUDY J. CERONE
B. FRANKLIN MARTIN, III
MICHAEL H. RUBIN *
McGLINCHEY STAFFORD LANG
A Law Corporation
643 Magazine Street
New Orleans, LA 70130
(504) 586-1200
Attorneys for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Section 552(a) of the Bankruptcy Code provides the general rule that post-petition property of the debtor or estate is not subject to any lien resulting from a pre-petition security agreement. Section 552(b) provides a limited exception for liens resulting from pre-petition security agreements and applicable non-bankruptcy law which apply to "proceeds, product, offspring, rents, or profits" of pre-petition property. The question presented in this case is:

> Whether the business revenues generated by the operation of a hotel, after a bankruptcy petition has been filed by that business, are "rents" within the meaning of section 552(b).

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS AND RELATED CORPORATIONS

The parties before the Court are the same as in the courts below.

Petitioner, T-H New Orleans Limited Partnership, is a limited partnership whose general partner is Tollman-Hundley New Orleans Corp., and whose limited partners are Stanley S. Tollman, Monty D. Hundley, Arnold Tollman, Brett G. Tollman and Sanford Freedman.

Respondent is Financial Security Assurance Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS AND RELATED CORPORATIONS	ii
TABLE OF AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
JURISDICTIONAL STATEMENT	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. Introduction	3
B. Facts and Procedural History	4
REASONS FOR GRANTING THE WRIT	6
I. THE FIFTH CIRCUIT'S RULING CREATES A CONFLICT AMONG THE CIRCUITS AND THE LOWER FEDERAL COURTS ON AN IMPORTANT ISSUE OF FEDERAL BANKRUPTCY LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT	6
II. THE FIFTH CIRCUIT'S RULING DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE LOUISIANA SUPREME COURT, THE STATE COURT OF LAST RESORT	11
III. THE FIFTH CIRCUIT'S RULING DECIDED AN IMPORTANT ISSUE OF FEDERAL BANKRUPTCY LAW IN DIRECT VIOLATION OF RULES OF STATUTORY INTERPRETATION ESTABLISHED BY THIS COURT	15
CONCLUSION	19
APPENDICES	

TABLE OF AUTHORITIES

Cases

Page

Butner v. United States, 440 U.S. 48 (1979) 7, 11-12, 14, 15

Corn Prod. Refining Co. v. Commissioner, 350 U.S. 46 (1955) 8

Financial Sec. Assurance Inc. v. Days Cal. Riverside Ltd. Partnership, 1992 WL 471706 (E.D. Cal. Aug. 18, 1992), *appeal docketed*, No. 92-16536 (9th Cir. Aug. 28, 1992) 9, 10, 18

Financial Sec. Assurance Inc. v. Tollman-Hundley Dalton, L.P., No. 4:93-356-HLM (N.D. Ga. Feb. 28, 1994), *aff'g*, 162 B.R. 62 (Bankr. N.D. Ga. 1993) 9, 10, 14, 15-16

Gleason v. Thaw, 236 U.S. 558 (1914) 8

Harrison v. PPG Indus., Inc., 466 U.S. 578 (1980) 8

In re Airport Inn Associates, Ltd., 132 B.R. 951 (Bankr. D. Colo. 1990) 10

In re Ashkenazy Enterprises, 94 B.R. 645 (Bankr. C.D. Cal. 1986) 10

In re Ashoka Enterprises, Inc., 125 B.R. 845 (Bankr. S.D. Fla. 1990) 10

In re Behring Trader, Inc., 944 F.2d 500 (9th Cir. 1991) 8, 9, 17

In re Blue Ridge Motel Assocs., 106 B.R. 81 (Bankr. W.D. Pa. 1989) 10

In re Bumper Sales, Inc., 907 F.2d 1430 (4th Cir. 1990) 9

In re Churchill Properties VIII Ltd. Partnership, 1994 WL 58279 (Bankr. N.D. Ill. Jan. 10, 1994) 9

In re GGVXX, Ltd., 130 B.R. 322 (Bankr. D. Colo. 1991) 10

In re Greater Atl. and Pac. Inv. Group, Inc., 88 B.R. 356 (Bankr. N.D. Okla. 1988) 10

In re Green Corp., 154 B.R. 819 (Bankr. D. Me. 1993) 9-10

In re Hamilton, 18 B.R. 868 (Bankr. D. Colo. 1982) 17

In re Investment Hotel Properties, Ltd., 109 B.R. 990 (Bankr. D. Colo. 1990) 10

TABLE OF AUTHORITIES—Continued

	Page
In re Kearney Hotel Partners, 92 B.R. 95 (Bankr. S.D. N.Y. 1988)	10
In re Majestic Motel Associates, 133 B.R. 523 (Bankr. D. Me. 1991)	10
In re Miami Center Associates Ltd., 144 B.R. 937 (Bankr. S.D. Fla. 1992)	10
In re Mid-City Associates, 114 B.R. 643 (Bankr. D. Minn. 1990)	10
In re Nendels-Medford Joint Venture, 127 B.R. 658 (Bankr. D. Ore. 1991)	10
In re Northview Corp., 130 B.R. 543 (Bankr. 9th Cir. 1991)	9
In re Oceanview/Virginia Beach Real Estate Associates, 116 B.R. 57 (Bankr. E.D. Va. 1990)	10
In re Punta Gorda Associates, 137 B.R. 535 (Bankr. M.D. Fla. 1992)	10
In re S.F. Drake Hotel Assoc., 131 B.R. 156 (Bankr. N.D. Cal. 1991), *aff'd*, 147 B.R. 538 (N.D. Cal. 1992)	10
In re Sacramento Mansion, Ltd., 117 B.R. 592 (Bankr. D. Colo. 1990)	10
In re Shorehaven Motor Inn, Inc., 124 B.R. 617 (Bankr. S.D. Fla. 1991)	10
In re Tri-Growth Centre City, Ltd., 133 B.R. 524 (Bankr. S.D. Cal. 1991)	10
Local Loan Co. v. Hunt, 292 U.S. 234 (1934)	17
Matter of Israel-British Bank (London), Ltd., 536 F.2d 509 (2d Cir. 1976)	8
Nobelman v. American Sav. Bank, 113 S.Ct. 2106 (1993)	7
Patterson v. Shumate, 112 S. Ct. 2242 (1992)	15
Pennsylvania Dept. of Pub. Welfare v. Davenport, 110 S.Ct. 2126 (1990)	6, 15
Piedmont & Northern Ry. Co. v. I.C.C., 286 U.S. 299 (1932)	8
Pioneer Bank and Trust Co. v. Oechsner, 468 So.2d 1164 (La. 1985)	12-14
Pioneer Inv. Ser. Co. v. Brunswick Assoc. Ltd. Partnership, 113 S.Ct. 1489 (1993)	17
Rake v. Wade, 113 S.Ct. 2187 (1993)	18

TABLE OF AUTHORITIES—Continued

	Page
Rodrock v. Security Indus. Bank, 642 F.2d 1193, 1197 (10th Cir. 1981)	17
Smith v. Howard, 489 So.2d 1037 (La. App. 1st Cir. 1986)	12
Toibb v. Radloff, 111 S.Ct. 2197 (1991)	15
Transouth Fin. Corp. v. Johnson, 931 F.2d 1501 (11th Cir. 1991)	8
Union Bank v. Wolas, 112 S.Ct. 527 (1991)	15
United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988)	7, 8
United States v. Energy Resources Co., Inc., 495 U.S. 545 (1990)	17
United States v. PS Hotel Corp., 404 F.Supp. 1188 (E.D. Mo.), *aff'd*, 527 F.2d 500 (8th Cir. 1975)	10
United States v. Ron Pair Enter., Inc., 489 U.S. 235 (1989)	15
W.T. Grant Co. v. Mitchell, 416 U.S. 600 (1974)	12

Statutes and Legislative History

11 U.S.C. § 362(a)	14
11 U.S.C. § 552(a)	6
11 U.S.C. § 552(b)	*passim*
28 U.S.C. § 157	2
28 U.S.C. § 158	5
28 U.S.C. § 158(a)	2
28 U.S.C. § 1254(1)	2
La. Civ. Code art. 2965	12
La. Civ. Code art. 3218	11
La. Civ. Code art. 3233	11
La. Civ. Code art. 3494(1)	11
La. Civ. Code art. 3494(2)	12
La. R.S. § 47:301(14)(a)	12
S. Rep. No. 95-989, 95th Cong., 2d Sess. 91 (1978), *reprinted in* U.S. Code Cong. & Admin. News 5787 (1978)	17

Court Rules

Supreme Court Rule 10.1(a)	6, 11

TABLE OF AUTHORITIES—Continued

Other Authorities	Page
S.540, 103d Cong., 1st Sess., § 206 (1993)	18
Averch, *The Heartbreak Hotel for Secured Lenders: When Postpetition Revenue from a Hotel is Not Subject to Prepetition Security Interest*, 107 Banking L.J. 484 (1990)	18
Calderon, *The Significance and Implications of the Rents Versus Accounts Receivable Debate in Hotel Bankruptcies*, 21 Real Est. L.J. 136 (1992)	3, 18
Clark & Clark, "Fifth Circuit Holds That Post-Petition Hotel Revenues Are Protected As 'Rents' From Pre-Petition Collateral," *Clark's Secured Transactions Monthly* (Warren Gorham Lamont), Vol. 9, No. 10 (Dec. 1993)	18
Donahue & Edwards, *The Heartbreak Hotel Revisited: Hotel Bankruptcy and Suggested Solutions to the Confusion over Hotel Income/Receipts Issue*, 111 Banking L.J. 25 (1994)	3, 18
Edwards & Murray, *Hotel Room Revenues: Bates Motel Revisited*, 22 Real Est. L.J. 116 (1993)	18
Freyermuth, *Of Hotel Revenues, Rents and Formalism in the Bankruptcy Courts: Implications for Reforming Commercial Real Estate Finance*, 40 U.C.L.A. L.Rev. 1461 (1993)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-

T-H NEW ORLEANS LIMITED PARTNERSHIP,
Petitioner,

v.

FINANCIAL SECURITY ASSURANCE INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner, T-H New Orleans Limited Partnership, respectfully petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit, reversing the ruling of the district court, which allowed a creditor to reach post-petition hotel business revenues as "rent" under 11 U.S.C. § 552(b).

OPINIONS AND ORDERS BELOW

The December 17, 1993, opinion of the Fifth Circuit Court of Appeals is reported at 10 F.3d 1099 and reproduced in Appendix A, p. 1a. The October 8, 1992, ruling of the United States District Court, Eastern District of Louisiana, is reported at 148 B.R. 456 and reproduced

in Appendix B, p. 17a. The March 23, 1992, Order of the United States Bankruptcy Court, Eastern District of Louisiana, is unreported and reproduced in Appendix C, p. 44a. The Memorandum Opinion accompanying that Order is reported at 144 B.R. 327 and reproduced in Appendix C, p. 34a. The May 1, 1992, Order of the United States Bankruptcy Court for the Eastern District of Louisiana is unreported and reproduced in Appendix D, p. 45a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit issued its decision on December 17, 1993. This petition is timely filed on March 17, 1994. This Court, therefore, has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

The jurisdiction of the United States District Court for the Eastern District of Louisiana was based on 28 U.S.C. § 158(a), and the jurisdiction of the United States Bankruptcy Court for the Eastern District of Louisiana was based on 28 U.S.C. § 157.

STATUTE INVOLVED

This case presents issues of the application of the 11 U.S.C. § 552, which reads as follows:

(a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

(b) Except as provided in sections 363, 506(c), 522, 544, 545, 547 and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case

and to proceeds, product, offspring, rents, or profits of such property, then such security interest extends to such proceeds, product, offspring, rents, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable non-bankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

STATEMENT OF THE CASE

A. Introduction

For the past several years, the hotel industry in the United States has been mired in financial crisis. One commentator suggests that fully 60 percent of all U.S. hotel loans, worth approximately $6 billion, are in default.[1] This uncertainty in the hotel industry is compounded by the problems faced by the hotel lending community, consisting mainly of insurance companies and commercial banks, which is actively monitoring hotel loan portfolios and making difficult decisions regarding problem hotel loans.[2] It, therefore, is inevitable that many hotel businesses will seek safe harbor under the United States Bankruptcy Code [3] in an attempt to weather the financial storm the hotel industry faces.

The petitioner herein, T-H New Orleans Limited Partnership, is one such hotel business. For reasons beyond its control, the partnership filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in early 1991, both to forestall imminent foreclosure by respond-

---

[1] Calderon, *The Significance and Implications of the Rents Versus Accounts Receivable Debate in Hotel Bankruptcies*, 21 Real Est. L.J. 136, 136 (1992) ("Calderon").

[2] Calderon at 136-37; *see also* Donahue & Edwards, *The Heartbreak Hotel Revisited: Hotel Bankruptcy and Suggested Solutions to the Confusion over Hotel Income/Receipts Issue*, 111 Banking L.J. 25, 27 n.5 (1994) ("Donahue & Edwards").

[3] 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code" or the "Code").

ent, its mortgage lender, and to reorganize its business affairs for the benefit of all of its creditors. These creditors include secured and unsecured lenders and institutional and trade creditors, as well as its equity interest holders.

The opportunities for successful reorganizations in hotel business bankruptcy cases, that are made available by Congress under the plain terms of the Bankruptcy Code, have been dealt a near-mortal blow by the decision of the United States Court of Appeals for the Fifth Circuit in this case. That decision effectively deprives hotel debtors of the protections Congress drafted into the Bankruptcy Code because, using the premise that the legislative history is silent, the Fifth Circuit extended creditors' pre-petition security interests in a hotel's business revenues to new funds generated by post-petition operations of the hotel business. The Fifth Circuit's decision, granting pre-petition security interests an automatic right to deprive the debtor of post-petition revenues, gives a creditor a greater right than the creditor would have under state law.

B. Facts and Procedural History

Petitioner acquired a hotel on Canal Street in New Orleans, Louisiana (the "Hotel"), on June 14, 1988, and has operated the Hotel continuously since that date. In February 1989, petitioner refinanced the mortgage debt on the Hotel. That refinancing was part of a mortgage bond financing transaction involving, on the one hand, petitioner and six other hotel parterships with hotels located in California, Georgia and Florida, and, on the other hand, respondent and others who arranged the financing. As part of the refinancing transaction, petitioner granted to the secured parties security interests in essentially all of the Hotel property and the business revenues generated therefrom.

Because of financial problems experienced by the other hotel partnerships (whose debt petitioner had cross-

guaranteed), and in order to forestall a foreclosure action by respondent, petitioner filed a voluntary petition under chapter 11 of the Bankruptcy Code in February 1991.

On or about August 13, 1991, respondent filed in the bankruptcy court a motion for adequate protection or segregation of hotel receipts. In that motion, respondent requested adequate protection of its alleged security interest in the revenues produced by petitioner's business operations at the Hotel after the petitioner commenced its bankruptcy case. The petitioner duly filed an objection to the motion. The bankruptcy court received evidence at a hearing on the motion held on September 11, 1991, after which the bankruptcy court took the matter under advisement.

Some six months later, on March 23, 1992, the bankruptcy court issued its Memorandum Opinion and its Order granting the motion, ordering that petitioner's business revenues be segregated retroactively from March 19, 1991, onward, and further ordering counsel for the parties to confer and subsequently submit to the bankruptcy court an order concerning future use of those business revenues. [p. 44a, *infra*]. On May 1, 1992, the bankruptcy court entered an Order which implemented its earlier March 23, 1992, Order. [p. 45a-49a, *infra*].

On May 11, 1992, petitioner properly perfected a notice of appeal to the United States District Court for the Eastern District of Louisiana in accordance with 28 U.S.C. § 158. By Judgment, dated October 7, 1992, the district court reversed the bankruptcy court's Orders of March 23 and May 1, 1992, and further ordered respondent to return all payments made by petitioner to respondent pursuant to the bankruptcy court's May 1, 1992, Order. [p. 32a-33a, *infra*]. Respondent then appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit reversed, holding that petitioner's post-petition hotel business revenues are "rents" and,

therefore, are subject to respondent's pre-petition security agreement by virtue of section 552(b) of the Bankruptcy Code.[4] [p. 16a, *infra*].

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S RULING CREATES A CONFLICT AMONG THE CIRCUITS AND THE LOWER FEDERAL COURTS ON AN IMPORTANT ISSUE OF FEDERAL BANKRUPTCY LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The granting of certiorari is appropriate to resolve conflicts between the decisions of the United States courts of appeals and between the lower federal courts on important issues of federal bankruptcy law that have not been, but should be, decided by this Court. Sup.Ct.R. 10.1(a); *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 110 S.Ct. 2126, 2130 (1990). This case presents just such a situation.

Bankruptcy Code section 552 is at issue in this case. It provides the general rule that post-petition property of the debtor or estate is not subject to any lien resulting from a pre-petition security agreement. 11 U.S.C. § 552 (a). Section 552(b) provides a limited exception for liens resulting from pre-petition security agreements and applicable non-bankruptcy law which apply to "proceeds, product, offspring, rents, or profits" of pre-petition property.[5]

---

[4] The Fifth Circuit decision arose from four consolidated appeals. [p. 4a, *infra*]. This petition for writ of certiorari seeks review of only that portion of the decision relating to case numbers 92-3941 c/w 92-3942, which concerned respondent's motion for segregation of hotel revenues or adequate protection.

[5] Section 552(b) provides, in relevant part:

> if the debtor and an entity entered into a security agreement before the commencement of the case
>
> and if the security interest created by such security agreement extends to property of the debtor acquired before the

The issue presented in this case is the proper meaning of the word "rents" in this section in connection with the business revenues generated by the operation of a hotel, after a bankruptcy petition has been filed by the hotel business.

The term "rents" is not defined by the Code. However, because "rent" is a property interest created and defined by state law and because this Court has held that state law should govern property interests to ensure their uniform treatment within the states, state law provides the definition of "rents" as used in section 552(b). *Butner v. United States*, 440 U.S. 48 (1979); *accord, Nobleman v. American Sav. Bank*, 113 S.Ct. 2106, 2110 (1993). The Fifth Circuit initially indicated that it should look at state law to determine the meaning of "rents" in that section of the Code; however, the Fifth Circuit not only reached an erroneous interpretation of state law, it also rested its determination on the supposition that the absence of express Congressional intent to deal with this issue supported an expansive interpretation of the term "rents."

Rather than conduct its analysis solely on the basis of state law, the Fifth Circuit searched the legislative history of section 552(b) to determine whether Congress intended to "exclude the revenues generated by hotels and motels for the use of their lodging rooms by third parties;" but the court was "unable to locate even a scintilla of such intent." [p. 13a, *infra*]. The appellate court did not, however, explain the relevance of Congressional in-

---

commencement of the case and to proceeds, product, offspring, rents, or profits of such property

then such security interest extends to such proceeds, product, offspring, rents or profits acquired by the estate after the commencement of the case

to the extent provided by such security agreement and by applicable non-bankruptcy law . . . .

11 U.S.C. § 552(b); see also *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 374 (1988).

tent to the interpretation of the term "rent" or justify its conclusion that absence of legislative history supports an expansive, rather than a restrictive, interpretation of that term.[6]

Rules governing construction of the bankruptcy laws dictate that an exception to a general rule be construed strictly to limit the exception. *Gleason v. Thaw,* 236 U.S. 558, 561-62 (1914); *Transouth Fin. Corp. v. Johnson,* 931 F.2d 1501, 1508 (11th Cir. 1991); *Matter of Israel-British Bank (London), Ltd.,* 536 F.2d 509, 513 (2d Cir. 1976); *see also Corn Prod. Refining Co. v. Commissioner,* 350 U.S. 46, 52 (1955); *Piedmont & Northern Ry. Co. v. I.C.C.,* 286 U.S. 299, 311-12 (1932). The Fifth Circuit's expansive interpretation of the section 552(b) exception to the general rule of section 552(a) violated this fundamental rule of statutory construction. The Fifth Circuit decision also conflicts directly with two prior decisions of the Ninth and Fourth Circuits on the appropirate method of construction of section 552(b).

The Ninth Circuit in *In re Behring Trader, Inc.,* 944 F.2d 500 (9th Cir. 1991), addressed directly the scope of section 552(b). The court found that section 552(b) "provides a *narrow* exception to the general rule of 552 (a)." *Id.* at 502 (emphasis in original). A contrary construction of section 552(b) "would result in the exception swallowing the rule." *Id.*

---

[6] The premise implicit in this reasoning, that the absence of legislative history supports an expansive interpretation of the term "rents" in section 552(b), is flawed. The absence of legislative history on this point, just as easily, could support a contrary interpretation. See, *e.g., Timbers of Inwood Forest,* 484 U.S. at 380-81; *Harrison v. PPG Indus., Inc.,* 466 U.S. 578, 592 (1980) ("[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark") (footnote omitted).

The Fourth Circuit in *In re Bumper Sales, Inc.*, 907 F.2d 1430 (4th Cir. 1990), also adopted a restrictive, rather than an expansive, interpretation of section 552(b). In *Bumper Sales*, the Fourth Circuit interpreted the term "proceeds," one of the five categories of property interests, which includes "rents," contained within the section 552(b) exception. Even though faced with the legislative history that suggested an expansive definition of "proceeds," the Fourth Circuit, nonetheless, adopted a restrictive interpretation of that term. *Id.* at 1437.

The properly narrow approach to the exceptions in section 552(b) adopted by both the Ninth Circuit in *Behring Trader* and the Fourth Circuit in *Bumper Sales* conflicts directly with the incorrect, expansive approach taken by the Fifth Circuit's broad reading, an approach that threatens to accomplish what *Behring Trader* warned against—expanding the exception so much that it threatens to swallow the general rule. The danger of this expansive reading is being felt already in the lower courts.[7] This conflict should be resolved by this Court in favor of the restrictive approach used by the Ninth and Fourth Circuits. The granting of certiorari, therefore, is appropriate in this case.

The Fifth Circuit decision in this case also conflicts with the great majority of decisions of the district courts and bankruptcy courts that directly have held that "hotel revenues" are not included within the term "rents" in section 552(b).[8] Two of those district court decisions

---

[7] The Fifth Circuit's reading of the exception already has begun to infect the lower courts. See *In re Churchill Properties VIII Ltd. Partnership*, 1994 WL 58279 (Bankr. N.D. Ill. Jan. 10, 1994).

[8] *Financial Sec. Assurance Inc. v. Tollman-Hundley Dalton, L.P.*, No. 4:93-CV-356-HLM (N.D. Ga. Feb. 28, 1994), *aff'g*, 162 B.R. 26 (Bankr. N.D. Ga. 1993); *Financial Sec. Assurance Inc. v. Days Cal. Riverside Ltd. Partnership*, 1992 WL 471706 (E.D. Cal. Aug. 18, 1992), *appeal docketed*, No. 92-16536 (9th Cir. Aug. 28, 1992); *In re Northview Corp.*, 130 B.R. 543 (Bankr. 9th Cir. 1991); *In re*

are integrally related to this case because they involve respondent, as the secured creditor, and partnerships affiliated with petitioner, as debtors.[9] Both of those related district court decisions conflict with the Fifth Circuit decision in this case. One of those decisions currently is on appeal to the Ninth Circuit and the second likely will be appealed to the Eleventh Circuit.[10] There is the very real possibility, therefore, that an irreconcilable conflict

---

Green Corp., 154 B.R. 819 (Bankr. D.Me. 1993); *In re Punta Gorda Assoc.*, 137 B.R. 535 (Bankr. M.D. Fla. 1992); *In re Tri-Growth Centre City, Ltd.*, 133 B.R. 524 (Bankr. S.D. Cal. 1991); *In re Majestic Motel Assoc.*, 131 B.R. 523 (Bankr. D. Me. 1991); *In re Airport Inn Assoc., Ltd.*, 132 B.R. 951 (Bankr. D. Colo. 1990); *In re GGVXX, Ltd.*, 130 B.R. 322 (Bankr. D. Colo. 1991); *In re Nendels-Medford Joint Venture*, 127 B.R. 658 (Bankr. D. Ore. 1991); *In re Ashoka Enter., Inc.*, 125 B.R. 845 (Bankr. S.D. Fla. 1990); *In re Shorehaven Motor Inn., Inc.*, 124 B.R. 617 (Bankr. S.D. Fla. 1991); *In re Sacramento Mansion, Ltd.*, 117 B.R. 592 (Bankr. D. Colo. 1990); *In re Oceanview/Virginia Beach Real Estate Assoc.*, 116 B.R. 57 (Bankr. E.D. Va. 1990); *In re Investment Hotel Properties, Ltd.*, 109 B.R. 990 (Bankr. D. Colo. 1990); *In re Blue Ridge Motel Assocs.*, 106 B.R. 81 (Bankr. W.D. Pa. 1989); *In re Ashkenazy Enter.*, 94 B.R. 645 (Bankr. C.D. Cal. 1986); *In re Kearney Hotel Partners*, 92 B.R. 95 (Bankr. S.D.N.Y. 1988); *In re Greater Atl. and Pac. Inv. Group, Inc.*, 88 B.R. 356 (Bankr. N.D. Okla. 1988); *see also United States v. PS Hotel Corp.*, 404 F.Supp. 1188 (E.D. Mo.), *aff'd*, 527 F.2d 500 (8th Cir. 1975); *contra, In re S.F. Drake Hotel Assoc.*, 131 B.R. 156 (Bankr. N.D. Cal. 1991), *aff'd*, 147 B.R. 538 (N.D. Cal. 1992); *In re Miami Center Assoc. Ltd.*, 144 B.R. 937 (Bankr. S.D. Fla. 1992); *In re Mid-City Assoc.*, 114 B.R. 643 (Bankr. D. Minn. 1990).

[9] *Financial Sec. Assurance Inc. v. Tollman-Hundley Dalton, L.P.*, No. 4:93-CV-356-HLM (N.D. Ga. Feb. 28, 1994), *aff'g*, 162 B.R. 26 (Bankr. N.D. Ga. 1993); *Financial Sec. Assurance Inc. v. Days Cal. Riverside Ltd. Partnership*, 1992 WL 471706 (E.D. Cal. Aug. 18, 1992), *appeal docketed*, No. 92-16536 (9th Cir. Aug. 28, 1992).

[10] *Days California* has been fully briefed and is awaiting oral argument before the Ninth Circuit. *Tollman-Hundley Dalton* was decided by the district court only very recently and the time for appeal to the Eleventh Circuit has not yet expired. Petitioner anticipates that respondent will appeal, just as it did in this case and in *Days California*.

between the circuits on the appropriate definition of the term "rents" in section 552(b) will exist once opinions are issued in those two related cases.

Accordingly, petitioner respectfully suggests that the granting of certiorari is appropriate in order to resolve the conflict between the courts of appeals on whether the exceptions contained in section 552(b) should be interpreted restrictively or expansively. The granting of certiorari also is appropriate to resolve the conflict between the Fifth Circuit and the lower federal courts on the important issue of federal bankruptcy law presented by this case (whether "hotel revenues" are included within the term "rents" used in section 552(b)) which has not been, but should be, decided by this Court.

II. THE FIFTH CIRCUIT'S RULING DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE LOUISIANA SUPREME COURT, THE STATE COURT OF LAST RESORT.

The granting of certiorari is also appropriate when a United States court of appeals has decided a federal question that conflicts with the ruling of a state court of last resort. Sup. Ct. R. 10.1(a). Again, this case presents just such a situation.

As noted above, *Butner* directs the lower courts to look to state law when deciding bankruptcy issues involving questions of property interests that are created and defined by state law. Whether the term "rents," as used in section 552(b), includes or excludes "hotel revenues," is such a bankruptcy issue which turns on state law, in this case the law of Louisiana.

Louisiana law always has differentiated between landlord-tenant and innkeeper-guest relationships.[11] Recog-

[11] *E.g.*, *compare* La. Civ. Code art. 3218 (lessor's privilege), *with* art. 3233 (innkeeper's privilege); *compare* La. Civ. Code art. 3494(1) (prescription [statute of limitations] for actions for the recovery of compensation for services rendered, including lodging

nizing those distinctions, the Louisiana Supreme Court has held, clearly and unambiguously, that hotel and motel revenues "are not 'rent . . . produced by [the] property' " which is used in the business of operating a hotel. *Pioneer Bank and Trust Co. v. Oechsner*, 468 So.2d 1164, 1168 (La. 1985). Thus, the court of last resort in Louisiana has concluded, unequivocally, that *"rents" do not include "hotel revenues."* According to *Butner*, therefore, the only possible interpretation of the term "rents" as used in section 552(b) in a Louisiana bankruptcy case, must be that "rents" do not include "hotel revenues."

While the Fifth Circuit referred to and purported to follow the conclusion of the Louisiana Supreme Court in *Pioneer Bank*, in fact it took quotations out of context from the court's opinion and reached a conclusion that is directly contrary to the holding of the state's highest court.

The issue before the Louisiana Supreme Court in *Pioneer Bank* was the interpretation of articles of the Louisiana Code of Civil Procedure dealing with writs of sequestration in Louisiana [12] in order to decide

> whether the revenues [produced by a motel after it has been seized under a writ of sequestration] are "rents or revenue produced by [the] property," *i.e.*, "revenues therefrom."

Id. at 1168. In deciding this issue, the court recognized the traditional legal distinctions between landlord/tenant

---

and board), *with* art. 3494(2) (prescription for actions for arrearages in rent); see *Smith v. Howard*, 489 So.2d 1037, 1038 (La. App. 1st Cir. 1986) and La. Civ. Code art. 2965 (both of which impose special duties on innkeepers that are not imposed on landlords); see also La. R.S. § 47:301(14)(a) (which imposes sales and use taxes on the furnishing of hotel rooms, which is defined as the sale of a service, while not imposing the tax on the renting of real property).

[12] Louisiana's sequestration provisions have been the subject of this Court's scrutiny in *W.T. Grant Co. v. Mitchell*, 416 U.S. 600 (1974), which held that the procedure did not violate due process principles.

and innkeeper/guest relationships. On the basis of these distinctions, the court stated:

> Therefore, we conclude, the revenues at issue are not "rent . . . produced by the property."

Id. However, the court further reasoned, based on the specific facts before it:

> Nonetheless, we find that they are "revenues therefrom" for two reasons: First, the revenues paid into Superdome Motor Inn by its guests are, like rent, paid for the use of the property. In that sense, they, like rent, are produced by the property. Second, the mortgage expressly covers all property, movable and immovable, "used in connection with the operation of the . . . property." This combination of facts, *i.e.* the nature of the revenues and that the mortgage covers all property used in the operation of the property, leads us to conclude that the revenues at issue are "produced by [the] property."

Id. Thus, while the Louisiana Supreme Court held that motel revenues are subject to sequestration because they are revenues "paid for the use of the property," the court also held, specifically, that those revenues are not "rent."

There simply is no way to reconcile the Fifth Circuit's decision with the Louisiana Supreme Court decision in *Pioneer Bank*. There can be no middle ground: either hotel revenues are "rents" or they are not. The Louisiana Supreme Court has said they are not; conversely, the Fifth Circuit in this bankruptcy case held that they are.

The Fifth Circuit interpertation of *Pioneer Bank*, in light of the bankruptcy filing by petitioner, also creates the anomalous situation of respondent being treated differently (and more favorably) inside the bankruptcy case than it would have been treated outside of bankruptcy. Before the mortgage creditor in *Pioneer Bank* could reach the revenues produced by the debtor's motel, the creditor was required to have the motel seized for its exclusive

benefit by the sheriff under a court-issued writ of sequestration. *Pioneer Bank, supra* at 1167. Thus, court-authorized seizure of the motel for the benefit solely of the seizing creditor was the *sine qua non* of the creditor's right to the revenues produced by the motel. Here, respondent did not have the Hotel seized under a writ of sequestration because the bankruptcy filing by petitioner invoked the automatic stay of section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a), to prevent such a seizure. Nonetheless, the Fifth Circuit decision gives to respondent, under the guise of section 552(b), a right to the revenues produced by the Hotel which respondent would not have had under state law outside of bankruptcy because the Hotel was never seized by respondent under a writ of sequestration.

The Fifth Circuit ruling, therefore, treats hotel revenues differently in and out of bankruptcy cases in Louisiana. This anomalous result conflicts with the directive of *Butner* that property interests be treated uniformly inside and outside of bankruptcy. *Accord, Financial Sec. Assurance v. Tollman-Hundley Dalton, L.P.*, No. 4:93-CV-356-HLM, slip op. at 13-14 (N.D. Ga. Feb. 28, 1994), *aff'g*, 162 B.R. 26 (Bankr. N.D. Ga. 1993).

The Fifth Circuit decision, therefore, decides a federal question (whether hotel revenues are "rents" under section 552(b)) in a way in direct and irreconcilable conflict with a decision of the Louisiana Supreme Court and in conflict with the directive of this Court in *Butner*. The granting of certiorari, therefore, is appropriate in order to resolve these conflicts.

III. THE FIFTH CIRCUIT'S RULING DECIDED AN IMPORTANT ISSUE OF FEDERAL BANKRUPTCY LAW IN DIRECT VIOLATION OF RULES OF STATUTORY INTERPRETATION ESTABLISHED BY THIS COURT.

Judicial application of the Bankruptcy Code must be guided by the fundamental canon that statutory interpretation begins with the language of the statute itself. *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 110 S.Ct. 2126, 2130 (1990); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989). The "plain language" of the Code often disposes of the question presented to the court. *Toibb v. Radloff*, 111 S.Ct. 2197, 2199 (1991); *Patterson v. Shumate*, 112 S.Ct. 2242, 2246 (1992). Absent a "scrivener's error" producing an absurd result, a court should not ignore or alter the plain meaning of the words used in the Code to foster either perceived alternative Congressional intent or inequity that might result from an application of the statute as written. *Union Bank v. Wolas*, 112 S.Ct. 527, 534 (1991) (Scalia, J., concurring).

The holding below is contrary to these principles. As is apparent from the Fifth Circuit's discussion of what is not in the Congressional history, the court of appeals substituted its own notion of what the Code *should* say for what the Code *actually* says. The court's stated reasons for its radical departure from the textualist approach to statutory construction do not justify avoiding application of the text as written. This case, therefore, presents this Court with an opportunity to reaffirm to the lower courts that the plain language of the Bankruptcy Code must be applied as Congress has written it, rather than as the judiciary may perceive it should have been written.

Because *Butner* dictates that state law governs the interpretation of the term "rents," only state law is relevant in interpreting that term. *Financial Sec. Assurance Inc. v. Tollman-Hundley Dalton, L.P.*, No. 4:93-CV-356-

HLM, slip op. at 10 (N.D. Ga. Feb. 28, 1994), *aff'g*, 162 B.R. 26 (Bankr. N.D. Ga. 1993). Therefore, any perceived Congressional intent regarding the meaning of the word "rents," or any perceived commercial policy, is completely irrelevant. *Id.* at 10-11 and 13. State law, and state law alone, should govern the interpretation of the term to ensure uniform treatment of property interests within each state.

The Fifth Circuit's holding ignored this interpretative methodology to achieve a result that is not only directly at odds with the plain meaning of the word "rents" as used in the Code, but also in conflict with the interpretation of that same word under applicable Louisiana law. The Fifth Circuit's holding, therefore, rewrote both state law, as interpreted by the state's court of last resort, and Bankruptcy Code section 552(b) to include property interests (hotel revenues) that were not included within the plain meaning of the word "rents" used in the statute.[13]

While this revision to section 552(b) may, or may not, be desirable from a legislative viewpoint, it exceeds the scope of judicial authority. The Fifth Circuit's holding adds to section 552(b) a protection for certain secured

---

[13] Therefore, according to the Fifth Circuit, section 552(b) now reads as follows:

> if the debtor and an entity entered into a security agreement before the commencement of the case
>
> and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, rents *and hotel revenues or anything else which is "like rents,"* or profits of such property
>
> then such security interest extends to such proceeds, product, offspring, rents *and hotel revenues or anything else which is "like rents,"* or profits acquired by the estate after the commencement of the case
>
> to the extent provided by such security agreement and by applicable non-bankruptcy law . . . .

lenders which was not specified by Congress in the Code itself. *See United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 550 (1990).

The Fifth Circuit's opinion appears to be guided by an appeal to commercial policy and equity rather than the terms of the statute and state law. The court opined that

> [t]he income flow generated by the Hotel revenues are an integral part of the value that the lender assigns to the collateralized property. If, as indicated by *Pioneer*, a lender may reach and control revenues from a hotel for purposes of Louisiana's sequestration remedies, we can see no reason for depriving that same lender of the benefit of his expressly bargained-for-security when the question is application of § 552(b) in bankruptcy. To deprive the lender of what he bargained for at closing, especially when that expectation matches the intent of the borrower, is inequitable and ignores widely accepted lending practices of the business community.

[p. 15a, *infra*]. Again, pretermitting the question of the relevance of commercial policy and equitable considerations, the court ignored the fundamental purpose of section 552—to adjust pre-bankruptcy contract rights between the debtor and its secured creditors by "freeing-up" after-acquired property to foster the overriding goal of ensuring the success of the reorganization process. See S. Rep. No. 95-989, 95th Cong., 2d Sess. 91 (1978), *reprinted in* U.S. Code Cong. & Admin. News 5787, 5877 (1978); *Behring Trader*, 944 F.2d at 502; *see Pioneer Inv. Ser. Co. v. Brunswick Assoc. Ltd. Partnership*, 113 S.Ct. 1489, 1495 (1993). The Bankruptcy Code, necessarily and constitutionally, alters pre-existing contract rights. *In re Hamilton*, 18 B.R. 868, 870 (Bankr. D.Colo. 1982) (*citing Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) and *Rodrock v. Security Indus. Bank*, 642 F.2d 1193, 1197 (10th Cir. 1981)). The intent of the parties, commercial policy, and equity, therefore, become irrelevant once Congress has determined that contract

rights should be altered by the Code. *Rake v. Wade*, 113 S.Ct. 2187, 2192-93 (1993).[14]

The issue is not, as the Fifth Circuit decision seems to posit, whether, based on the intent of the parties, commercial policy, or equity, the rights of the hotel mortgage lender *should* be altered by the hotel owner's bankruptcy filing; rather, the only issue is whether the express terms of the Bankruptcy Code, as specifically enacted by Congress, do, in fact, alter those rights. The Fifth Circuit impermissibly substituted its own notion of what section 552(b) should say (*i.e.*, to include both "rents" as well as revenues that are "like rent"), in the place of what Congress has determined the Code does say (*i.e.*, "rents" only).

---

[14] The current state of jurisprudence over a secured creditor's rights to post-petition hotel revenues has produced a plethora of creditor-oriented publications urging the courts to ignore the text of the Code and base their decisions on the "commercial realities" involved in hotel financing and on the "intent of the parties." See, *e.g.*, Donahue & Edwards, *supra* note 2; Freyermuth, *Of Hotel Revenues, Rents and Formalism in the Bankruptcy Courts: Implications for Reforming Commercial Real Estate Finance*, 40 U.C.L.A. L.Rev. 1461 (1993); Edwards & Murray, *Hotel Room Revenues: Bates Motel Revisited*, 22 Real Est. L.J. 116 (1993); Calderon, *supra* note 1; Averch, *The Heartbreak Hotel for Secured Lenders: When Postpetition Revenue from a Hotel is Not Subject to Prepetition Security Interest*, 107 Banking L.J. 484 (1990); Clark & Clark, "Fifth Circuit Holds That Post-Petition Hotel Revenues Are Protected As 'Rents' From Pre-Petition Collateral," *Clark's Secured Transactions Monthly* (Warren Gorham Lamont), Vol. 9, No. 10 (Dec. 1993), at 1-3. As noted in the text, however, these arguments are completely unavailing. Rather, to the extent that creditors view the current provisions of the Bankruptcy Code as unfair, "the appropriate remedy lies with the legislative branch" and not with the courts. *Financial Sec. Assurance Inc. v. Days Cal. Riverside Ltd. Partnership*, 1992 W.L. 471706, at *3 (E.D. Cal. Aug. 18, 1992), *appeal docketed*, No. 92-16536 (9th Cir. Aug. 28, 1992). For an example of such creditor-sponsored legislative action, see S.540, 103d Cong., 1st Sess., § 206 (1993), which is pending currently in Congress.

Only this Court has the power to remedy the Fifth Circuit's judicial rewriting of section 552(b). Petitioner respectfully requests that this Court grant certiorari to reverse the decision of the Fifth Circuit and, thereby, reaffirm the principle that the courts must apply the Bankruptcy Code as written by Congress rather than as they perceive it should have been written.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

RUDY J. CERONE
B. FRANKLIN MARTIN, III
MICHAEL H. RUBIN *
McGLINCHEY STAFFORD LANG
A Law Corporation
643 Magazine Street
New Orleans, LA 70130
(504) 586-1200
Attorneys for Petitioner

* Counsel of Record